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No. 07-562

IN THE
Supreme Court of the United States

ALTRIA GROUP, INC., AND PHILIP MORRIS, USA INC.,
Petitioners,

v.

STEPHANIE GOOD, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF OF AMICI CURIAE TOBACCO CONTROL LEGAL CONSORTIUM, AARP, AND PUBLIC JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

This brief in support of respondents is filed on behalf of amici curiae Tobacco Control Legal Consortium, AARP, and Public Justice.

The Tobacco Control Legal Consortium (TCLC) is a national network of legal centers providing technical assistance to public officials, health professionals and advocates in addressing legal issues related to tobacco and health, and supporting public policies that will reduce the harm caused by tobacco use in the United States. TCLC is supported by national advocacy organizations, voluntary health organizations and others, and it files legal briefs as amicus curiae in cases in which its experience and expertise may assist courts in resolving tobacco-related issues of national significance, including *Philip Morris v. Williams*, 127 S. Ct. 1057 (2007), and *Rowe v. N.H. Motor. Transp. Ass'n*, 128 S. Ct. 989 (2008).

AARP is a nonpartisan, nonprofit organization with nearly forty million members. AARP works to foster the health and economic security of individuals as they age by improving the health care system and promoting healthy behaviors. Tobacco use is

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

recognized by most as one of the top health indicators related to disease prevention and health promotion. As the largest membership organization representing the interests of people 50 and over, AARP has also long supported laws and public policies designed to protect and preserve the availability of legal redress when people are harmed in the marketplace.

Public Justice is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. Through involvement in precedent-setting and socially significant litigation, Public Justice seeks to ensure that tort law fully serves its dual purposes — compensating those injured by wrongful conduct and deterring similar conduct in the future. Public Justice is gravely concerned that, if the tort system is closed to innocent victims of petitioners' fraudulent misrepresentations through application of the preemption doctrine in this case, neither of these purposes will be served.

Amici have a significant interest in this case. More than 45 million Americans smoke cigarettes, and the vast majority of them — over 80 percent — smoke "light" or "ultra light" cigarettes. *United States v. Philip Morris*, 449 F. Supp. 2d 1, 508 (D.D.C. 2006), *appeal pending*, No. 06-5267 *et al.* (D.C. Cir.). More than half of these smokers believe, because Philip Morris and other tobacco companies repeatedly told them so, that "light" cigarettes are less dangerous than regular cigarettes and that switching to "light" cigarettes is an alternative to quitting. *Id.* at 467-68,

488-92, 513-29, 860. They are wrong. The scientific evidence — long concealed by petitioner Philip Morris — is unequivocal: "light" cigarettes are no less deadly than regular cigarettes and offer no health benefit whatsoever.

This case is important because it presents two questions that will determine whether consumers victimized by the deliberate misrepresentations, concealment and fraud committed by Philip Morris and other cigarette companies may seek redress. The first is whether the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 *et seq.* ("Labeling Act"), preempts state law claims challenging Philip Morris' use of false and deceptive means to persuade smokers that "light" cigarettes are less dangerous than other cigarettes. As amici demonstrate below, and as this Court held in *Cipollone v. Liggett Group*, 505 U.S. 504, 529 (1992) (plurality), there is no indication in the Labeling Act that Congress intended it to shield cigarette companies from fraud claims based on violation of state law duties not to deceive.

Equally insubstantial is Philip Morris' implied preemption argument, which claims that the Federal Trade Commission (FTC) "authorized" the use of health descriptors like "light" and that the FTC has a "low tar" policy that would be undermined were Philip Morris to be held liable for its fraud under state law. The short answer is that Philip Morris' arguments are pure smoke: The FTC never authorized Philip Morris' use of "light" or "low tar" as descriptors and does not have and never has had a "low tar" policy. There is

thus no federal "policy" placed at risk by state law claims and no basis for a finding of preemption.

Philip Morris' argument is wrong for another reason important to amici. The FTC has sweeping, nation-wide jurisdiction over unfair and deceptive trade practices, but ordinarily the FTC's exercise of authority does not preempt state consumer protection claims. Consumer protection is one area in which federal and state law have long and successfully co-existed. To ensure that state authority in consumer protection matters is not displaced without notice to the states and careful deliberation, Congress has directed the FTC to follow certain procedures to exercise its preemptive power — procedures the FTC did not employ here. A finding of FTC preemption in this case would not only be at odds with the FTC's denial that it authorized the use of health descriptors or has a "low tar" policy, but also could seriously undermine the ability of states to enforce their own consumer protection and anti-fraud statutes concurrently with FTC enforcement efforts.

STATEMENT

1. The Introduction of "Light" and "Low Tar" Cigarettes.

By the early 1950s, evidence began to mount linking cigarette smoking with lung cancer. In 1964, the United States Surgeon General issued his Report on Smoking and Health, announcing that a scientific consensus had been reached that cigarette smoking

causes diseases and death. *See Cipollone*, 505 U.S. at 513. Even before the public began to understand the link between smoking and disease, Philip Morris and other cigarette companies "knowingly and intentionally engaged in a scheme to defraud smokers, for the purpose of financial gain, by making false and fraudulent statements, representations and promises" to counteract that understanding. *United States v. Philip Morris,* 449 F. Supp. 2d at 852.

To capitalize on the public's growing apprehension about the link between cigarettes and lung cancer, Philip Morris and other companies developed "light" cigarettes, including Marlboro Lights. Philip Morris knew that, notwithstanding the descriptor "light," Marlboro Lights provided no safety benefit for smokers. Philip Morris' own research showed that smokers receive comparable quantities of tar and nicotine regardless of the kind of cigarette they smoke. Nonetheless, Marlboro Lights were branded "Light" and marketed to foster the illusion that they represent an acceptable alternative to quitting, or at least a step towards decreasing smokers' health-risks and dependence on cigarettes. *Id.* at 477-81; 504-06.

The introduction and marketing of Marlboro Lights was integral to Philip Morris' scheme to dissuade smokers from quitting. The district court in *United States v. Philip Morris* found:

> As their internal documents reveal, Defendants engaged in massive, sustained, and highly sophisticated marketing and promotional

> campaigns to portray their light brands as less harmful than regular cigarettes, and thus an alternative to quitting, while at the same time carefully avoiding any admission that their full-flavor cigarettes were harmful to smokers' health. Defendants knew that by providing worried smokers with health reassurance, they could keep them buying and smoking cigarettes.

449 F. Supp. 2d at 860. Philip Morris' internal documents reflect this strategy. One company memorandum explains that the company's goal was to introduce a "socially acceptable cigarette" that would be "a welcomed alternative to quitting, and might attract new smokers who would not otherwise choose to become product users." *Id.* at 490.[2]

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[2] In mid-1966, the FTC decided to standardize tar and nicotine content measurements and informed the cigarette companies that factual representations about tar and nicotine content would not be deemed deceptive so long as they (1) were based on the "Cambridge Filter Method" (a testing method that used a smoking machine to determine tar and nicotine content); and (2) made no claims that the levels of tar and nicotine reduced health hazards. *See FTC v. Brown & Williamson Tobacco Co.*, 778 F.2d 35, 37 (D.C. Cir. 1985).

Philip Morris engineered Marlboro Lights to deliver to smokers the same tar and nicotine as other cigarettes, while delivering lower levels when measured by a smoking machine. The evidence on this point is overwhelming. *United States v. Philip Morris*, 449 F. Supp. 2d at 461-68;

(continued...)

These marketing efforts have been remarkably successful. A majority of "light" cigarette smokers believe that "light" cigarettes are "better for your health" than regular cigarettes. *Id.* at 524-25, 860. Not surprisingly, the market share for "light" cigarettes rose from 2% in 1967 to 81% of cigarette sales in 1998. *Id.* at 508; *see also id.* at 475-561.

2. Proceedings Below.

This action was brought by Stephanie Good and other long-time Marlboro Light smokers on their own behalf and on behalf of a class of similarly-situated

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[2](...continued)
see also id. at 462 (quoting a 1967 memorandum by a Philip Morris scientist saying "the smoker, is, thus, apparently defeating the purpose of dilution to give him less smoke per puff. He is certainly not performing like the standard smoking machine; and to this extent the smoking machine data appears to be erroneous and misleading."); *see also id.* at 465-66 (discussing a 1975 Philip Morris study showing that smokers took "larger puffs" on Marlboro Lights than conventional Marlboro cigarettes and thus "did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery"). Despite this, Philip Morris complained to the FTC that the Cambridge Filter Method "may be deceptive because a smoker may assume his cigarette is delivering the amount of 'tar' and nicotine reported by the FTC when in fact it will be delivering much less, the way he smokes."). *Id.* at 501.

smokers in Maine.[3] Ms. Good and her co-plaintiffs alleged that they had smoked Marlboro Lights for at least fifteen years and that Philip Morris had engaged in unfair and deceptive practices in the design, manufacture, promotion and marketing of Marlboro Lights. The plaintiffs claimed that Philip Morris called and promoted Marlboro Lights as "light" and "low tar and nicotine" cigarettes to persuade consumers — especially those worried about the health risks of smoking — that Marlboro Lights are less dangerous than regular, or "full flavor," cigarettes. Philip Morris engaged in these efforts even though it knew, but concealed, evidence showing that Marlboro Lights deliver the same levels of tar and nicotine to smokers as do the company's regular cigarettes and thus pose no less risk to health.

Ms. Good and her co-plaintiffs contended that Philip Morris' misrepresentations violated the Maine Unfair Trade Practices Act, which "declare[s] unlawful" any "unfair or deceptive acts or practices in the conduct of any trade or commerce." Me. Rev. Stat. Ann. tit. 5, § 208(1). The essence of plaintiffs' claim is that by portraying Marlboro Lights as less harmful than other cigarettes, while at the same time concealing evidence that Marlboro Lights are *not* less harmful, Philip Morris breached its state law duty to not knowingly deceive consumers about a material fact. The Maine

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[3] This discussion is drawn from the lower courts' opinions in these cases. *See Good v. Altria Group, Inc.*, 436 F. Supp. 2d 132, 133-39, 144-45 & n.21 (D. Me. 2006), *rev'd*, 501 F. 3d 29, 30-36 (1st Cir. 2007).

statute does not purport to regulate smoking and health; to the contrary, it is a general anti-fraud, consumer protection statute, just like the Federal Trade Commission Act, on which it is modeled. *Id.* (citing 15 U.S.C. § 45(a)(1)).

Nonetheless, the district court found plaintiffs' claims expressly preempted by Section 1334(b) of the Labeling Act, which provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." The district court concluded that, under its reading of *Cipollone*, plaintiffs' claims should be characterized as failure to warn or "warning neutralization" claims, which are preempted by the Labeling Act. *See* 436 F. Supp. 2d at 151. The court did not reach Philip Morris' implied preemption argument.

The First Circuit reversed. The court first rejected Philip Morris' express preemption argument. Under *Cipollone*, the question is whether "the legal duty" that gives rise to the claim is "based on smoking and health." 501 F.3d at 38 (quoting 504 U.S. at 524 (plurality)). The court held that, because the fraudulent misrepresentation and concealment claims at issue in this case are based on a general duty not to deceive imposed by Maine law, and not a law targeting the marketing of cigarettes, they are not preempted by the Labeling Act. *Id.* at 38-39.

The court next rejected Philip Morris' implied preemption defense, which rested on what the company characterized as the FTC's "authorization" of its use of "Light" as a descriptor and the "FTC's low-tar policy" favoring the promotion of light cigarettes. After an exhaustive review of the FTC's statements, the court held that it could not "discern a coherent federal policy on low-tar claims," let alone a policy that would be threatened by respondents' state law claims. 501 F.3d at 55.

SUMMARY OF ARGUMENT

Amici file this brief to emphasize a point that may not stand out in respondents' more comprehensive treatment of the issues before the Court — namely, that there is no hint in either the Labeling Act or in the FTC's on-again, off-again actions regarding disclosure of cigarettes' tar and nicotine content that Congress or the FTC intended to "insulate [cigarette] manufacturers from longstanding rules governing fraud." *Cipollone*, 505 U.S. at 528-29.

Make no mistake, this case is about fraud. As the United States argued in its civil racketeering action against Philip Morris and other cigarette companies, "marketing of 'light' cigarettes is a principal weapon in their attempts to mislead the public regarding the health risks of smoking." Brief for the United States in *United States v. Philip Morris, et al.*, No. 06-5267, *et al.*, at 146 (D.C. Cir. filed Nov. 19, 2007). The question in this case is whether petitioners are shielded from state anti-fraud litigation because Congress or the FTC

preempted fraud claims arising from statements made to deceive smokers that "light" cigarettes are less deadly than regular cigarettes. The answer to that question is "no."

To be sure, this Court in *Cipollone* held that the Labeling Act preempts state law claims that would require cigarette companies to add or modify the warnings prescribed by Congress. But *Cipollone* also held that the Labeling Act does *not* preempt claims arising from false statements made in advertising, press statements, government submissions and other channels of communication, where the claim is based on the duty not to deceive. 505 U.S. at 528, 529 (plurality). Thus, allegations that a cigarette company deliberately misrepresented and concealed material facts in violation of a state anti-fraud statute — the precise allegations at issue here — are not preempted. *Id.* As the plurality saw it, Congress did not intend the Labeling Act "to insulate cigarette manufacturers from longstanding rules governing fraud." *Id.* Such claims are not predicated on a duty "based on smoking and health," but on a general duty imposed by state law — *i.e.*, the duty not to deceive. *Id.* at 528-89. Petitioners' theory should be rejected because it would, contrary to Congress' intent, effectively insulate cigarette manufacturers from rules governing fraud, no matter how egregious the manufacturers' false statements or fraudulent concealment.

Equally insubstantial is petitioners' argument that the FTC "authorized" tobacco companies to use "Light" as a product descriptor (Marlboro Lights), and that

permitting respondents' claims to go forward "would impede the FTC's low-tar policy." Br. at 46. The signal defect in petitioners' argument is that the FTC itself disclaims the existence of any authorization or policy, let alone a policy that justifies ousting longstanding state anti-fraud laws. Even Philip Morris has acknowledged elsewhere that there is no such policy. In 2002, Philip Morris filed a petition with the FTC urging the agency "to promulgate rules governing . . . the use of descriptors such as 'light' and 'ultra light.'" *See Good*, 501 F.3d at 56 n.29. Philip Morris' petition, of course, would have been superfluous had the FTC previously "authorized" the use of these descriptors.

Just as fundamentally, the hodge-podge of FTC actions cited by the Philip Morris as evidence of a federal policy on light cigarettes could not have the sweeping preemptive effect it claims. Because the FTC's mission of protecting consumers against unfair and deceptive advertising practice overlaps with state law, Congress established regulatory procedures for the FTC to follow when it intends to take preemptive action. *See, e.g., American Financial Servs. Ass'n v. FTC*, 767 F.2d 957, 989-90 (D.C. Cir. 1985). The FTC did not avail itself of those procedures here, which further confirms the FTC's position that it did not act to preempt state law. For these reasons as well, petitioners' implied preemption argument should be rejected.

ARGUMENT

I. The Labeling Act Does Not Preempt Respondents' Claims.

Philip Morris' central argument is that plaintiffs' fraud claims are expressly preempted by the Labeling Act. Philip Morris thus asks this Court to engage in legal alchemy — *i.e.*, to transform the Labeling Act, a statute designed to inform the public of the health risks of smoking, into an instrument of deception. Philip Morris' argument cannot be reconciled with this Court's holding in *Cipollone* or with the plain text of the Labeling Act.[4]

A. Cipollone *Forecloses Petitioners' Express Preemption Claim.*

Dissatisfied with this Court's ruling in *Cipollone*, Philip Morris and its amici urge the Court either to disregard its holding or to abandon it altogether.

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[4] The Labeling Act's preemption provision states that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b). Those provisions require that packages of cigarettes and their advertisements bear one of a rotating series of warnings about the adverse health effects of smoking. *Id.* § 1333(a), (c). The Act also provides that no additional "statement relating to smoking and health . . . shall be required on any cigarette package." *Id.* § 1334(a).

Indeed, Philip Morris does not even begin its discussion of *Cipollone* until page 37 of its brief. Notwithstanding *Cipollone*'s contrary ruling, Philip Morris argues that the phrase "based on smoking and health" should be read at the highest level of generality imaginable — one that renders it virtually limitless — and then contends that the preemptive scope of the Labeling Act should be construed to be equally limitless. Petitioners then argue that the Act bars any state law claim that challenges cigarette companies for making fraudulent claims about cigarettes that have anything to do with health. Br. at 23-25. There is no principle that limits petitioners' argument.[5]

Petitioners' reading of the Labeling Act was rejected by a solid majority of this Court in *Cipollone*. To be sure, the plurality opinion by Justice Stevens, joined by Chief Justice Rehnquist and Justices White and O'Connor, ruled that some, but by no means all, state law claims are preempted by the Act. 505 U.S. at 524-30. The plurality concluded that state law claims that would require cigarette companies to add or

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[5] Nor is Philip Morris' reading of the Labeling Act consistent with the way it, and other cigarette companies, understood it when it was enacted, or even during the first twenty years the Labeling Act was on the books. As the Court observed in *Cipollone*, even though there was a "great deal of litigation relating to cigarette use beginning in the 1950s," it was not until *Cipollone* that the companies "raised [§ 1334(b)] as a pre-emption defense." 505 U.S. at 520 n.17.

modify the warnings prescribed by Congress were preempted. Accordingly, failure to warn claims, and claims alleging that cigarette companies had engaged in advertising to "neutralize" the warnings, were found to be preempted. *Id.* at 524-26.[6]

But on the question presented here — namely, whether the Labeling Act preempts state law fraudulent misrepresentation and concealment claims — seven Justices endorsed the view that these claims are not "based on smoking and health" and are therefore not preempted. Indeed, on this issue, the label "plurality" is something of a misnomer. Justice Blackmun's separate opinion, joined by Justices Kennedy and Souter, maintained that the Labeling Act did not preempt *any* State law damages claims; it would have allowed all of Cipollone's claims to proceed. 505 U.S. at 542. Thus, contrary to Philip Morris' suggestion that the division in *Cipollone* somehow supports its position, Br. at 44, there was in fact a solid, seven Justice *majority* of the *Cipollone* Court taking the view that, at the very least, Congress in the Labeling Act did not intend to preempt fraudulent concealment and advertising claims based on general state law requirements.

The plurality's opinion explains why Congress made that judgment. According to the plurality, the "central inquiry" in determining whether a state law claim is

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[6] On this issue, the opinion was joined by Justices Scalia and Thomas, who otherwise dissented. 505 U.S. at 550.

preempted is "whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health' . . . giving that clause a fair but narrow reading." 505 U.S. at 523-24. Because the *Cipollone* petitioner alleged that tobacco companies had made false representations of material fact or concealed material facts concerning the health consequences of smoking, *see id.* at 510, 528, his claims of fraudulent misrepresentation could have been viewed as falling within the text of Section 1334(b), at least if as broadly construed as Philip Morris urges. The plurality rejected that reading of Section 1334(b), finding "the phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements." 505 U.S. at 529. Accordingly, the plurality ruled that the fraudulent misrepresentation claims were not preempted because they were "predicated not on a duty 'based on smoking and health' but rather on a more general obligation — the duty not to deceive." *Id.* at 528-29.

The plurality found that interpretation of Section 1334(b) appropriate for a number of reasons: (1) there was no evidence that Congress intended to insulate cigarette manufacturers from longstanding rules governing fraud; (2) the legislative history showed that Congress intended for the term "based on smoking and health" to be construed narrowly and not to reach traditional exercises of states' police power; (3) state law prohibitions against fraud do not create "diverse, nonuniform, and confusing" standards that would

conflict with the Labeling Act's uniformity goal; and (4) holding the claims preempted would conflict with the background presumption against preemption. *Id.* at 529 & nn.26, 27; *see also id.* at 530.

Applying the teachings of *Cipollone* here, plaintiffs' claims are not preempted. Plaintiffs' claims are not predicated on "a requirement or prohibition *based on* smoking or health." The Maine statute on which plaintiffs' action rests does not operate on the basis of, or even refer to, smoking or health. Nor is there any contention that the Maine legislature enacted its anti-fraud statute based on the health consequences of smoking. *Compare Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 547 (2001) (striking down billboard ordinance because it "expressly target[ed] cigarette advertising"). Plaintiffs' fraud claims are instead based on Maine's general duty not to deceive consumers about material facts. These are precisely the claims that *Cipollone* held were not subject to preemption under the Labeling Act.

Petitioners and their amici have no answer to this argument, other than to take aim at *Cipollone*. They argue for a reading of the phrase "based on smoking and health" that would cut off *all* state fraud claims — even those based on generally applicable legal requirements — so long as there is an arguable nexus between the allegedly fraudulent statements and smoking and health. That argument fails for at least two reasons.

First, it overlooks the fact that Congress did nothing in 1965 or 1970 to regulate the *content* of cigarette advertising; it simply mandated warning labels on cigarette packages and later on advertisements. The Labeling Act did not address anything else about the advertising practices of the cigarette makers. Had Congress wanted to vest the FTC with exclusive jurisdiction to regulate cigarette advertising and promotion, as petitioners appear to contend, it could have done so, but did not. Nonetheless, petitioners would have this Court conclude that Congress, which did not even require warnings on cigarette advertising until 1985, intended to render the states powerless to respond to even the most patently misleading and fraudulent cigarette ads, no matter how little the FTC chose to do under its general powers to police unfair and deceptive advertising. There is simply no basis for inferring that Congress intended to give cigarette companies a license to deceive. *See Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (finding no intent to preempt field that Congress has left unregulated); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 500 (1996) (construing a general preemption provision to apply only "where a particular state requirement threatens to interfere with a specific federal interest").[7]

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[7] This point takes on particular force here, given the long-standing collaboration between the FTC and the states in consumer protection matters. As discussed below, *see* Part II.C., *infra*, at the time Congress enacted the Labeling

(continued...)

Second, the construction of the Labeling Act urged by Philip Morris and its amici leads to palpably absurd results, which they ignore. Under their reading of the Act, Philip Morris is free to place *any* health claim on labels, in advertising, in press releases, in government submissions, and in other public statements, no matter how false, deceptive, misleading, or far-fetched. In their view, so long as there is an arguable nexus between a state law claim and smoking and health, no state can take any action to force cigarette companies to stop deceiving their customers.

To see the breath-taking scope of Philip Morris' argument, assume that Philip Morris were to make the following claims about Marlboro Lights: "Smoking helps you lose weight;" "Smoking fights Parkinson's Disease," and "Smoking wards off depression." Assume as well that each of these claims is false and that many consumers purchased and smoked Marlboro Lights to obtain these illusory benefits. Under Philip Morris' theory, state law claims alleging deliberate misrepresentation and fraud, even if brought by a State Attorney General under a general anti-fraud statute like Maine's, would be preempted because those claims would seek to impose a state law

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[7](...continued)
Act it was well aware of the cooperative relationship between the FTC and the states. Yet petitioners' reading would eliminate any role for the state in policing fraud and deceptive conduct in the advertising and promotion of cigarettes.

requirement or prohibition based on smoking and health relating to the promotion of Marlboro Lights. There is no limiting principle to this argument, and these examples are just the tip of an iceberg. Under Philip Morris' reading, the Labeling Act — a statute designed to ensure that the public is informed of the risks of smoking — becomes an instrument of deception.

It was precisely this concern that led the *Cipollone* plurality to draw the line where it did. As the *Cipollone* plurality recognized, there is no reason, either in the text or history of the Labeling Act, to think that Congress intended to shield cigarette manufacturers from liability when they engage in intentional fraud.

B. *The Case Against Preemption Here is Even More Compelling Than in* Cipollone.

There is one crucial difference between this case and *Cipollone* that makes the case against preemption here even more compelling. In *Cipollone*, the essence of the plaintiff's claim was that the tobacco companies, through advertising and promotion, sought to *minimize* or *neutralize* the health warnings Congress required on cigarette labels and advertising. 505 U.S. at 510. The argument was that the tobacco companies were trying to convey the message that smoking cigarettes is not as hazardous as the government wants you to believe.

But with Marlboro Lights, and other "light" cigarettes, the fraud claim is that "light" cigarettes are

named, designed, and promoted *to take advantage* of the public's response to health warnings. As explained above, light cigarettes like Marlboro Lights were created to capitalize on the fears of smokers and to induce them not to quit by persuading them that "light" cigarettes offer a less dangerous alternative to regular cigarettes. It is no coincidence that Marlboro Lights were introduced in 1971, just when the new warnings were being placed on labels and advertising. *United States v. Philip Morris*, 449 F. Supp. 2d at 338-39, 477-81, 516-17. In designing and promoting Marlboro Lights, Philip Morris' strategy was not to neutralize or minimize the warnings. Instead, it was to tell a public, now informed of the risks of smoking that, whatever health risks *regular* cigarettes may pose, "*light*" cigarettes are different because they pose less of a health risk, reduce dependence on tobacco, are an alternative to quitting, and are socially acceptable. *Id.*

As a result, in this case (as in other "light" cases) plaintiffs argue that Philip Morris engaged in fraudulent and deceptive acts that fall outside the preemptive scope of the Labeling Act. These fraudulent acts include: (a) designing light cigarettes to deliver comparable quantities of nicotine and tar as regular cigarettes, but to deliver lower amounts when machine-tested, (b) using false health descriptors like "Light" to persuade smokers that they receive less tar and nicotine than from other cigarettes, (c) concealing evidence showing Marlboro Lights are just as deadly as other cigarettes, and (d) making statements to the public, to the press, to public health agencies, and to

Congress and other legislative bodies promoting the understanding that "light" cigarettes are safer while concealing evidence that proves that the statements are false. *See Good,* 436 F. Supp. 2d at 144 & n.21 (summarizing complaint). These actions, which amount to intentional fraud on Philip Morris' part, are plainly beyond the preemptive reach of the Labeling Act. *See Cipollone*, 505 U.S. at 529. For this reason too, petitioners' express preemption argument should be rejected.

C. *The Text of the Labeling Act Refutes Petitioners' Open-Ended Reading.*

Even if this Court is inclined to reexamine *Cipollone*, notwithstanding the *stare decisis* force of a sixteen-year-old statutory interpretation decision, the outcome of which was supported by seven Justices, *see, e.g.*, *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 756 (2008), and reaffirmed seven years ago in *Reilly*, *see* 553 U.S. at 549-50, the result should remain the same. The text of Section 1334(b) confirms the correctness of the *Cipollone* plurality's ruling that the phrase "no requirement or prohibition based on smoking and health" is not open-ended, but is a term of limitation. There are two related points, in addition to those detailed above, that demonstrate the error in petitioners' argument.

1. *Petitioners' Motivation-Based Reading of the Act Is Contrary to its Text and Structure.*

Petitioners argue that, in determining whether a state requirement is based on smoking and health, the preemption question should turn on the State's *motive* in imposing the requirements, or even on the plaintiffs' motive in bringing the litigation, rather than on the character of the requirement itself. *See, e.g.*, Br. at 23. Thus, in petitioners' view, if a State's requirement was in any way motivated by the relationship between smoking and health, then it is preempted because the State seeks to "impose" a "requirement" "based on smoking and health." *Id.* at 23-25.

The text and structure of Section 1334(b) refute petitioners' motive-based interpretation. They make clear that the phrase "based on smoking and health" modifies "requirement or prohibition," not "imposed;" that is, the state law *requirement* must be based on smoking and health for the preemption provision to kick in. The phrase is therefore most naturally read as referring to the objective character of the requirement or prohibition itself, not on the subjective reasons underlying the adoption of the State requirement at issue. If Congress had intended to require a motive-based inquiry, as petitioners contend, it would have located the phrase referring to smoking and health so that it modified "imposed" rather than "requirement or prohibition," and would have used words other than "based on" (such as "because of" or "on account of" smoking and health).

The contrast between this case and *Reilly* illustrates this point. In *Reilly*, the Court upheld a preemption challenge to state "regulations governing the advertising and sale of cigarettes." 533 U.S. at 532. The Court so held because regulations that "expressly target cigarette advertising" "squarely contradict[]" the Labeling Act. *Id.* at 547, 550. In contrast, *Reilly* observed, that "States remain free" to enact restrictions "that apply to cigarettes on equal terms with other products" because "[s]uch restrictions are not 'based on smoking and health,'" but are instead based on general requirements that apply equally to all consumer products. *Id.* This is just such a case.

Petitioners' construction also stretches "based on smoking and health" beyond its breaking point, transforming a term of *limitation* into a term of *inclusion*. Under petitioners' reading, almost *any* requirement or prohibition that a State might impose "with respect to the advertising or promotion of . . . cigarettes" would have as its underlying motivation a concern about the health consequences of smoking. Interpreting "based on smoking and health" to refer to the State's underlying motivation for imposing a requirement would deprive that phrase of any significant limiting force. Even a general zoning ordinance forbidding the placement of billboards (including those promoting cigarettes) near elementary schools to protect impressionable school children would likely fail petitioners' motive-based test. *But see Reilly*, 533 U.S. at 550. This Court has cautioned against interpreting a preemption provision in a manner that fails to give significant force to "words of limitation."

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995). Petitioners' proposed interpretation suffers from that vice.

2. *Petitioners' Effort to Substitute "Relating To" for "Based On" Should Also be Rejected.*

Petitioners' interpretation suffers from a second vice. Although petitioners do not say so directly, they seek to substitute the expansive term "relating to" for the narrower "based on." One tell-tale sign of this interpretive move is petitioners' repeated reliance on *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995). *Wolens* involved preemption questions under the Airline Deregulation Act, which, at the time, had a preemption provision that said that no state "shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law *relating to* rates, routes, or services of any air carrier." *Id.* at 222 (quoting 49 U.S.C. App. § 1305(a)(1)) (emphasis added).[8] The Court construed the operative phrase "relating to" to mean "having a connection with, or reference to, airline 'rates, routes, or services.'" *Id.* at 223 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 348 (1992)); *see also Cal. Div. of Labor Stds. Enforcement v. Dillingham Constr.*, 519 U.S. 316, 324 (1997) (giving similar reading to "relates to" under Employee Retirement Income Security Act).

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[8] The provision now appears at 49 U.S.C. § 41713(b)(1).

There is a vast difference between that broad test of relatedness and the far more focused "based on" language at issue here. The term "based on" or "based upon" is generally used by Congress and this Court to refer to the *legal grounds* for a claim. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 74, 82 (2006) (reviewing provision of the Securities Litigation Uniform Standards Act of 1998 and stating that "[n]o covered class action *based upon* the statutory or common law of any State . . . may be maintained in any State or Federal court by any private party," subject to certain exemptions) (emphasis added); *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 447 & n.22 (2005) (referring to claims "based on" fraud); *Wolens*, 513 U.S. at 233 (referring to a claim as one "based on state law"); *Perry v. Thomas*, 482 U.S. 483, 485 (1987) (noting that the "demands for arbitration were based on" agreement between the parties); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 149 (1982) (describing claim as one "based on" contract clause). As is clear, principles of ordinary usage counsel in favor of giving the term "based on" its established meaning — that is, as a reference for the legal basis of a complaint, not the sweeping construction petitioners urge.

For these reasons, and the reasons set forth in respondents' more elaborate presentation of the issues, petitioners' express preemption claim fails.

II. The FTC Has No "Policy" Regarding Health Descriptors or "Low Tar" Claims.

Petitioners' implied preemption argument rests on the assertions that the FTC "authorized" use of health descriptors like "light" and "low tar," and that the FTC established a policy favoring "low tar" cigarettes that would be impaired by permitting respondents' claim to proceed. The fatal defect in this argument is that it is built on wishful thinking, not history. The simple fact is that the FTC neither authorized Philip Morris to use "light" as a product descriptor nor established the "low tar" policy on which Philip Morris' argument hinges. That is not just our view; it is also the position of the United States. *See* Brief of the United States in *United States v. Philip Morris*, at 149-169. Because permitting respondents' claim to go forward would impair no federal policy, there is no basis for Philip Morris' implied preemption claim.

Amici leave it to respondents to review the history of the FTC's oversight of the cigarette industry to show, point-by-point, why Philip Morris' argument cannot be reconciled with the facts. But there are three points that merit emphasis.

A. *Philip Morris Defrauded the FTC as Well as the Public.*

Philip Morris' fraud extended to the FTC, which is why the United States has focused much of its fire in *U.S. v. Philip Morris* on Philip Morris' fraud relating to "light" cigarettes. *See id.* at 47-55, 130-32, 146-70, 202-04. The record in that case shows that on virtually

every issue relating to the design, testing and marketing of "light" cigarettes, Philip Morris and other companies deceived the FTC, as well as the public.

The record is unequivocal on this point, as just a few illustrations demonstrate.

* Philip Morris and other companies knew all about the behavior "light" cigarette smokers engage in to ensure that they maintain their intake of nicotine. *United States v. Philip Morris*, 449 F. Supp. 2d at 456, 461-67, 477-81, 488. This behavior, known as "compensation," includes taking deeper and more frequent puffs and holding the cigarette in a way that closes air holes that would otherwise dilute the smoke. *Id.* None of Philip Morris' evidence on compensation was furnished to the FTC. *Id.* at 504. Making matters worse, Philip Morris deliberately misrepresented the evidence on compensation in its submissions to the FTC. *Id.* at 500-04. For example, in 1998, Philip Morris and other cigarette companies filed public comments in response to an FTC inquiry about whether changes should be made to the "Cambridge Filter Method" of testing. *Id.* at 503-04. Philip Morris and the other companies sought to dissuade the FTC from taking action, arguing that the evidence on compensatory behavior "is highly equivocal" and so sparse that consumers should not even "be alerted to its existence." *Id.*

* Philip Morris also knew, but concealed, the serious flaws in the Cambridge Filter Method of assessing the tar and nicotine delivered to the smoker. *Id.* at 465-68. Indeed, Philip Morris had determined in

the mid-1960s that the Cambridge Filter Method was so flawed that it developed a "Human Smoker Simulator" that allowed the company to duplicate "exactly the smoking behavior of a given individual with a given cigarette." *Id.* at 464-65. Philip Morris concealed this testing advance from the FTC. *Id.*

* Philip Morris also sought to stave off FTC regulation of the use of descriptors like "light," "ultra light," and "low tar." At the same time the agency sought comments on the Cambridge Method, it asked whether there was a "need for official guidance" with respect to these descriptors. 62 Fed Reg. 48,158, 48,163 (1997). Philip Morris denied that there was such a need. *United States v. Philip Morris*, 449 F. Supp. 2d at 511-12.

These illustrations drive home that Philip Morris was not trying to deceive just the public, it was also trying to ward off consumer-protective regulation by deceiving the FTC. Under these circumstances, Philip Morris' claim that the FTC "authorized" its fraudulent acts is nothing short of audacious.

2. *Philip Morris' Own Statements Refute the Existence of a FTC "Policy."*

Apart from its efforts to deceive the FTC, Philip Morris has also made public statements that refute its FTC-authorization argument. For instance, as noted above, in 1997 the FTC observed that a presidential panel of experts had concluded that "[b]rand names and brand classifications such as 'light' and 'ultra light' represent health claims and should be regulated and

accompanied, in fair balance, with an appropriate disclaimer." 62 Fed. Reg. at 48,163. The FTC then asked whether "there [is] a need for official guidance with respect to the terms used in marketing lower rated cigarettes? If yes, why? If no, why not?" *Id.* In response, Philip Morris and other companies *rejected* the FTC's suggestion, contending that they "were not convinced that there is a need for official guidance with respect to the terms used in marketing" "light" cigarettes. *United States v. Philip Morris*, 449 F. Supp. 2d at 511-12. Not only does the FTC's query demonstrate that, in its view, it had never authorized descriptors, but Philip Morris' response shows that it sought to dissuade the FTC from even giving *guidance* on the marketing of "light" and "low tar" cigarettes.

Philip Morris confirmed its understanding that the FTC had *not* authorized use of health descriptors just a few years later. In 2002, it filed a petition with the FTC asking the agency "to promulgate rules governing . . . the use of descriptors, such as 'light' and 'ultra light.'" *See Good*, 501 F.3d at 56 n.29. Of course, had the FTC already authorized the use of descriptors, Philip Morris' petition would not have been necessary.

3. *The FTC's Jurisdiction over Fraud in the Marketing of Cigarettes is not Exclusive.*

Not only is Philip Morris' FTC-authorization argument belied by its own actions, but it also overlooks a key point: the FTC does not have exclusive jurisdiction to police fraud in the marketing and promotion of cigarettes. Congress did not intend for the FTC to "occupy the field" of consumer protection,

and state law unfair and deceptive practices claims are not preempted unless they conflict with FTC regulations. *See Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d at 989-90; *see also Holloway v. Bristol-Myers Corp.*, 485 F.2d 957, 999 (D.C. Cir. 1973). Indeed, because of the overlap between the FTC's authority and state and local consumer protection laws, Congress amended the FTC Act in 1975 to require the FTC to engage in rulemaking in order to preempt state law. These procedures, which go beyond those required by the APA, *compare* 5 U.S.C. § 553 *with* 15 U.S.C. §§ 57a(a)(2)-(b)(1), were designed to provide notice to the states and "to ensure the preemption decision will be carefully made." Paul R. Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 Duke L.J. 225, 243.

The amendments are quite explicit that the FTC must use its rulemaking authority to preempt state law. Section 57(a)(2) of the Act now provides that "[t]he Commission shall have no authority under this Act, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1))." As a result of these amendments, there is general agreement that, for the FTC to preempt state law, it must engage in rulemaking following the procedures set forth in the 1975 amendments. *See, e.g.*, *Am. Fin. Servs. Ass'n,* 767 F.2d at 989-90 & n.41; *Katharine Gibbs Sch. v. FTC*, 612 F.2d 658, 667 (2d Cir. 1979).

Petitioners' implied preemption argument fails for this reason as well. Even if, as Philip Morris claims,

the FTC's actions here amount to a "policy" — and they do not — that would not be sufficient to find preemption. Congress has required the FTC to engage in rulemaking in order to preempt State law. The FTC has not done so here. In the face of an unmistakable congressional mandate about how an agency must exercise its preemptive authority, the agency's failure to do so necessarily drains its actions of preemptive effect.

CONCLUSION

For the reasons set forth above and in respondents' brief, the judgment below should be affirmed.

Respectfully submitted,

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